NO. 80-216

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

CHARLES KAUFMAN,

Petitioner,

vs.

STATE OF NEW JERSEY, and
JOHN J. DEGNAN, as Attorney General
of the State of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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QUESTIONS PRESENTED FOR REVIEW

A. Was the warrantless search of petitioner's luggage while under the exclusive control of the police invalid necessitating the granting of petitioner's motion below to suppress evidence?

B. Should the *Chadwick-Sanders*[1] decisions be given retroactive application to all cases still pending at the time the decisions were rendered?

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[1] United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (1977)
Arkansas v. Sanders, ... U.S. ..... , 99 S. Ct. 2586 (1979)

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NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

CHARLES KAUFMAN,

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vs.

STATE OF NEW JERSEY, and
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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[2]Pursuant to Rule 21.1(b), counsel of record for petitioner hereby represents that the persons shown above comprise a list of all the parties to the proceeding. (Rules of Supreme Court.)

This is a petition for CHARLES KAUFMAN for a Writ of Certiorari to review the order made by the Supreme Court of the State of New Jersey, on May 28, 1980, refusing to review and reverse the decision of the Appellate Division, Superior Court of New Jersey, filed March 24, 1980, affirming the denial of petitioner's motion to suppress as evidence certain drugs found in a closed leather bag which petitioner had in his possession while riding as a passenger in a motor vehicle. The Judge of the Superior Court who presided over the motion hearing ruled that this Court's decision in *United States v. Chadwick* did not apply to the search in this case and that the police thus did not need a warrant to open private luggage taken from the automobile, even though all potential suspects had been detained and the luggage secured.

OPINIONS BELOW

To the petitioner's knowledge, neither the order of the New Jersey Supreme Court nor the opinion of the Appellate Division have been officially or unofficially reported as yet. (A copy of the opinion of the Appellate Division of the Superior Court of New Jersey is attached hereto as Appendix "A", and a copy of the order of the Supreme Court of New Jersey is attached as Appendix "B".)

JURISDICTION

1. On August 2, 1977, the Grand Jury for Hunterdon County returned an indictment charging petitioner with pos-

sessory charges and charges of intent to distribute controlled dangerous substances.

2. On September 9, 1977, petitioner filed a Notice of Motion to Suppress Evidence of the Warrantless Search. The hearing on the motion was held before the Honorable Richard Barlow, J.S.C., on July 19, 1978, who, by order entered July 27, 1978, denied the motion.

3. On October 17, 1978, petitioner pled guilty to Count Three of the indictment, which charged him with unlawful possession of Opium, Quaaludes, Cocaine and Marijuana with intent to distribute them on April 24, 1977. The plea bargain agreement was that the State would dismiss Counts One and Two, involving simple possession of the drugs, and not oppose the same bail pending appeal.

4. On December 15, 1978, petitioner was sentenced to a term of five to seven years in the New Jersey State Penitentiary. The court agreed to free petitioner on the same bail which was posted at the time of his arrest ($50,000.00).

5. A timely Notice of Appeal was filed with the Appellate Division of the New Jersey Superior Court on January 25, 1979. The appeal was argued before the Honorable Judges Samuel Allcorn and George B. Francis on February 25, 1980. On March 24, 1980, the court handed down a one-sentence per curiam opinion affirming Judge Barlow's denial of petitioner's motion to suppress evidence.

6. On April 9, 1980, petitioner filed a Notice of Petition for Certification to the Supreme Court of the State of New Jersey. The order of that court denying

the petition was filed on May 28, 1980.

7. This petition for certiorari is being filed less than 90 days from the aforesaid date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution.

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the places to be searched and the persons or things to be seized."

STATEMENT OF THE FACTS

On April 24, 1977, petitioner and an Edward Wilczenski were passengers in a chauffeur-driven limousine traveling from New York City to Easton, Pennsylvania by way of Route 22. At approximately 7:54 a.m., Officer Dennis M. Balent of the Bridgewater Township Police noted that the limousine was speeding as it passed through his radar, and he gave pursuit. Officer Balent followed the vehicle out of Bridgewater Township into Readington Township and, after three miles, pulled the vehicle off the highway. Bridgewater Township is located in Somerset

County, New Jersey, and Readington Township is located in Hunterdon County, New Jersey.

While checking the driving credentials of the chauffeur, Officer Balent noticed two passengers in the back of the vehicle. Because the passengers were dressed in blue jeans, Officer Balent decided to conduct a further investigation. Upon close observation, Officer Balent noted that Wilczenski had a clear plastic bag protruding from the pocket of his jacket. The officer ordered Wilczenski to give him the bag and, after examining it, placed Wilczenski under arrest and advised him of his constitutional rights.

Shortly after the bag was confiscated, two additional police vehicles arrived on the scene. In one vehicle was Officer Palani of the Bridgewater Police and in the other vehicle was Officer Smith of the Readington Township Police. One of these officers ordered petitioner from the vehicle. Officer Balent then entered the vehicle and, by himself, began an extensive search. He began with the front seat area of the car, checking around the seats and in the glove compartment. Nothing of an illegal or contraband nature was discovered by this effort.

Officer Balent next directed his attention to the back seat, where he observed a closed brown leather bag which he suspected contained drugs. The leather bag was opened by Officer Balent, whereupon he was confronted with three zippered areas. The middle zipper was opened, producing one brown bag. This bag was also opened, leading to another brown bag. Inside the second brown paper bag, smaller plastic bags containing alleged controlled dangerous substances were discovered.

At the time petitioner was ordered out of the vehicle,

and before the luggage was searched, he was in custody and not free to leave. Officer Balent testified that he believed the brown leather bag contained drugs because he suspected that the residue of white powder found in the plastic bag protruding from Wilczenski's jacket pocket was a controlled dangerous substance.

REASONS WHY THE WRIT SHOULD BE GRANTED

Shortly after this Court's decision in *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476 (1977), a number of the appellate courts were faced with the difficult issue of whether or not that decision should be given retroactive effect. To date, five Courts of Appeals,[3] relying upon the reasoning advanced by this Court in *United States v. Peltier*, 422 U.S. 531, 95 S. Ct. 2313 (1975), have held that *Chadwick* is not to be applied retroactively. One circuit, the Eighth, has held otherwise.

There is no question that good arguments can be advanced on both sides of the issue. The courts refusing to apply the decision retroactively have concluded that *Chadwick* represents a significant expansion of traditional Fourth Amendment protections and that the two primary rationales for the exclusionary rule–deterrent of unlawful police conduct and the "imperative of judicial integrity"–would therefore not be served by applying *Chadwick* to seizures which occurred before the decision and which law enforcement

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[3]The Ninth Circuit Court of Appeals recently questioned the validity of its prior rulings on this issue in United States v. MacKay, 606 F.2d 264 (9th Cir. 1979).

officers, because of prior statutory, administrative and judicial interpretation, reasonably believed in good faith to be admissible. The contra-argument is that *Chadwick* presents no question of retroactivity because *Chadwick* does not represent a departure from this Court's long-standing approach to the Fourth Amendment. Rather, the argument is that the Court simply reaffirmed the long-established constitutional principle that absent some exigency requiring an immediate search of luggage, a warrant must be obtained before law enforcement officers can search that luggage, even if seized from a vehicle.

The very actions of this Court have also provided support for retroactive application. *Chadwick* was decided on June 21, 1977. The search in *Arkansas v. Sanders*, ... U.S. ..... , 99 S. Ct. 2586 (1979), took place on April 23, 1976, and *Sanders* was decided on June 27, 1979. Without any reservation, this Court applied the *Chadwick* rule to a pre-*Chadwick* search in its *Sanders* opinion. In addition, six days after *Chadwick* was decided, the Court vacated a judgment of the Court of Appeals for the Eighth Circuit involving a 1974 brief-case search and remanded for further consideration in light of *Chadwick* (*Schleis v. United States*, 433 U.S. 905, 97 S. Ct. 2968). Also, after the Eighth Circuit concluded in *Schleis* (582 F.2d 1166 (8th Cir. 1978)) that *Chadwick* should be applied retroactively, this Court denied certiorari in *United States v. Stevie*, 582 F.2d 1175 (8th Cir. 1978), *cert. denied*, 443 U.S. 911, 99 S. Ct. 3102 (1979), though the decision in *Stevie* referred to the *Schleis* decision in determining the retroactivity issue.

It is thus readily apparent that only a direct decision by this Court on this very troublesome issue will resolve the

conflict not only raging in the federal court system but also among the various state appellate courts. In the past, the Court has chosen, by failing to grant certiorari in a number of cases, to provide a definitive answer on the question of retroactivity. However, due to the present split in the circuit courts and the various state appellate courts, it would appear that the time has finally arrived for this Court to speak out on this issue. Therefore, in order to provide the necessary uniformity of justice that our system demands, it is respectfully submitted that the instant Writ of Certiorari should be granted.

ARGUMENT

A. The Warrantless Search Of Petitioner's Luggage While Under The Exclusive Control Of The Police Was Invalid Necessitating The Granting Of Petitioner's Motion Below To Suppress Evidence.

Soon after the automobile came into widespread use, this Court first announced the automobile exception to the warrant requirement of the Fourth Amendment, holding that because of its mobility, an automobile that is stopped on the highway may be searched without a warrant when police officers have probable cause to believe it contains contraband or evidence of a crime (*Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925)). The Court later extended the ruling in *Carroll* to hold that when there is justification for a warrantless search of an automobile stopped on the highway, the search is not invalid if undertaken later at the police station (*Chambers v. Maroney*, 399 U.S. 42,

90 S. Ct. 1975 (1970); see also *Cady v. Dombrowski,* 413 U.S. 433, 93 S. Ct. 2523 (1973); *Cardwell v. Lewis,* 417 U.S. 583, 94 S. Ct. 2464 (1974)).

In the recent decisions of *United States v. Chadwick,* 433 U.S. 1, 97 S. Ct. 2476 (1977), and *Arkansas v. Sanders,* ..... U.S. ..... , 99 S. Ct. 2586 (1979), the Court declined to extend, however, the ruling of *Carroll* and its progeny to allow the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police. In *Chadwick,* federal agents seized a 200-pound footlocker incident to the arrest of three men, two of whom had just placed it in the trunk of an automobile. The arrest occurred before the trunk was closed. The locked footlocker, containing marijuana, was opened by unknown means after it had been removed by the agents to the Federal Building in Boston. The agents had probable cause to believe marijuana was in the footlocker, and the question–as the government posed it–was "[w]hether a search warrant is required before federal agents may open a locked footlocker that is properly in their possession and that they have probable cause to believe contains contraband" (97 S. Ct. at 2481, n. 3). The question was answered affirmatively because, "[t]here being no exigency, it was unreasonable for the government to conduct the search without the safeguards a judicial warrant provides" (97 S. Ct. at 2483). Thus, the Court concluded that "*when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police author-*

ity" (97 S. Ct. at 2486, emphasis added).

In the just decided case of *Arkansas v. Sanders, supra,* the Court reaffirmed its ruling in *Chadwick* in holding that police officers must obtain a warrant before searching luggage taken from an automobile which was properly stopped. Again dismissing the argument that the warrantless search of luggage is proper solely because such property is taken from an automobile lawfully stopped and searched on the street, the Court applied the rule laid down in *Chadwick* that "the exigency of mobility must be assessed at the point immediately before the search . . . " (99 S. Ct. at 2593). Therefore, once police have seized the object to be searched and have it securely within their control, "the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a general rule, there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places (*id.*, footnotes omitted).

Applying the *Chadwick-Sanders* rationale to the facts in the instant case, it is clear that no exigencies existed which made it necessary for the officers to search the entire vehicle, let alone the closed leather bag,[4] before obtaining a warrant.

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[4]The following cases have applied Chadwick to searches other than bulky footlockers. See United States v. Johnson, 588 F.2d 147 (5th Cir. 1979) [duffel bag]; United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978), cert. denied, 443 U.S. 911, 99 S. Ct. 3102 (1979) [suitcase]; United States v. Jackson, 576 F.2d 749 (8th Cir. 1978) [attache case]; United States v. Marchand, 564 F.2d 983 (2nd Cir. 1977), cert. denied, 434 U.S. 1015, 98 S. Ct. 732 (1978) [wallet]; United States v. Berry, 560 F.2d 861 (7th Cir. 1977) [attache case], vacated on other grounds, 571 F.2d 2, cert. denied, 439 U.S. 840, 99 S. Ct. 129 (1978); United States v. Vallieres, 443 F. Supp. 186 (D. Conn. 1977) [suitcase]; United States v. Ester, 442 F. Supp. 736 (S.D. N.Y. 1978) [suitcase].

There was simply no danger that the contents of the vehicle might have disappeared if the officers had taken the time to obtain a warrant. At the time of the search of the vehicle and its contents, all subjects were being detained and were safely within police control. Further, several police officers were present and the vehicle itself was within their firm grasp. Under such circumstances, there was no reason to suspect that the car would not remain safely in police custody until it was impounded and removed to the police garage and a warrant was obtained. As stated in *Arkansas v. Sanders, supra,* at page 2594:

> "Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected."

B. The *Chadwick-Sanders* Decision Should Be Given Retroactive Application To All Cases Still Pending At The Time The Decisions Were Rendered.

The problem of retroactive application of the exclusionary rule in a Fourth Amendment setting was squarely faced by this Court in *United States v. Peltier,* 422 U.S. 531, 95 S. Ct. 2313 (1975). In that case, the Court considered the retroactive application of the Court's decision in *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S. Ct. 2535 (1973), which had held warrantless border searches

without probable cause to be unconstitutional. The Court recognized that the search in *Peltier* was concededly illegal under *Almeida-Sanchez* but held "that the exclusionary rule should not be mechanically applied * * * because the policies underlining the rule do not justify its retroactive application to pre-*Almeida-Sanchez* searches" (422 U.S. at 534-535, 95 S. Ct. at 2316). The Court reached its decision after concluding that neither of the two major purposes of the exclusionary rule—the deterrent of unlawful police conduct and "the imperative of judicial integrity" —would be served by excluding evidence that "law enforcement officers reasonably believed in good faith" to be admissible, even if later decisions "broaden the exclusionary rule to encompass evidence seized in that manner" (*id.*, at 537, 95 S. Ct. at 2317). According to the Court, the critical question in determining if the exclusionary rule should be applied retroactively on a given set of facts is not so much whether the decision invalidating the search "constitutes a sharp break in the line of earlier authority" (*Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 499, 88 S. Ct. 2224, 2234 (1968)), but, rather, "[whether] the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment" (*id.*, at 542, 95 S. Ct. at 2320).

Relying on the above analysis, the Second, Fifth, Sixth, Seventh and Ninth Circuits have held that *Chadwick* is not to be applied retroactively. (*United States v. Reda*, 563 F.2d 510 (2nd Cir. 1977), *cert. denied*, 435 U.S. 973, 98 S. Ct. 1617 (1978); *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977); *United States v. Calandrella*, 605

F.2d 236 (6th Cir.), *cert. denied, United States v. Kaye,* ..... U.S. ..... , 100 S. Ct. 522 (1979); *United States v. Berry,* 571 F.2d 2 (7th Cir.), *cert. denied,* 439 U.S. 840, 99 S. Ct. 129 (1978); *United States v. Choate,* 576 F.2d 165, 182, n. 20 (9th Cir.), *cert. denied,* 439 U.S. 953, 99 S. Ct. 350 (1978).) The Eighth Circuit in *United States v. Schleis,* 582 F.2d 1166, 1173-1174 (8th Cir. 1978), has held otherwise.

The principal argument for retroactive application of *Chadwick* is that this Court so held *sub silentio* when it decided *Sanders,* as the search in *Sanders* occurred prior to the decision in *Chadwick.* Without any discussion, the Court applied the *Chadwick* rule to a pre-*Chadwick* search in its *Sanders* opinion. Indeed, the Ninth Circuit, one of the circuits which had refused to apply *Chadwick* retroactively, recently questioned its previous rulings in light of the *Chadwick* rule being applied to a pre-*Chadwick* search in *Sanders.* (See *United States v. MacKay,* 606 F.2d 264, 265, n. 2 (9th Cir. 1979.))

The other arguments in support of retroactivity are this Court's order of remand in *Schleis* for further consideration in light of *Chadwick* (433 U.S. 905, 97 S. Ct. 2968), and the denial by this Court of certiorari in *United States v. Stevie,* 443 U.S. 911, 99 S. Ct. 3102 (1979). In footnote 6 of the *Schleis* opinion, the Eighth Circuit viewed the remand order as direction to apply *Chadwick* retroactively (582 F.2d at 1173, n. 6; see also *United States v. Ochs,* 595 F.2d 1247, 1255 (2nd Cir. 1979)). It is submitted that it would have been an exercise in futility for this Court to have remanded *Schleis* had it not intended *Chadwick* to apply to pre-*Chadwick* searches. The Court's denial of certiorari in *Stevie,* even though

the decision referred to the *Schleis* decision on the retroactivity issue, constitutes further evidence of the Court's intention to apply *Chadwick* retroactively.

In addition to these arguments, the Eighth Circuit, in *Schleis* concluded that *Chadwick* presented no question of retroactivity because *Chadwick* did not represent a departure from this Court's long-standing approach to the Fourth Amendment. After an analysis of prior decisions by this Court, the *Schleis* court summarized its reasoning as follows:

> "Unlike *Peltier*, this case does not present a question of retroactivity and, thus, we need not reach the question of whether or not to apply the exclusionary rule. *Cf. United States v. Martinez*, 526 F.2d 954 (5th Cir. 1976) (holding the Supreme Court's decisions on border searches in *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975), and *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975), to be retroactive). *Chadwick* announces no new constitutional doctrine, nor does it broaden any existing exclusionary rule. All the Court did in *Chadwick* was to hold that warrantless searches of luggage absent an exigency are an invasion of a 'legitimate privacy interest' and cannot be justified under any of the long established exceptions to the Fourth Amendment warrant requirement. In so holding, the Court stressed that 'in this area we do not write on a clean slate.' *United States v. Chadwick, supra*, 433 U.S. at 9, 97 S. Ct. at 2482. While there had been no prior Supreme Court decisions explicitly establishing the

> existence of a legitimate privacy interest in luggage, the Court cites numerous decisions, including *Ex Parte Jackson*, 96 U.S. 727, 24 L. Ed. 877 (1878), and *United States v. Van Leeuwen*, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970), which 'reflect the subtle constitutional principles * * * that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasion of legitimate privacy interests, and not simply those interests found inside the four walls of the home.' *Id.*, 433 U.S. at 11, 97 S. Ct. at 2483 (fn. omitted). The Supreme Court need not have applied a well-settled constitutional principle to every possible fact situation before its decisions are entitled to retroactive effect. Moreover, in *Peltier*, the challenged border search had been conducted pursuant to statutory authority and similar searches had repeatedly been upheld against constitutional attack. *Id.*, 422 U.S. at 539-541, 95 S. Ct. 2313. Such is not the case here." (582 F.2d at 1174, footnotes omitted.)

Petitioner would urge this Court to adopt the reasoning in *Schleis* when finally ruling on this very troublesome issue. In both the *Chadwick* and *Sanders* opinions, the Court did state that it was simply refusing to extend the "automobile exception," as set forth in *Carroll* and *Chambers*, to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police. Basically, the Court only reaffirmed its prior rulings

that warrantless searches of one's personal property are unreasonable even if found outside the home. These prior rulings, as indicated by the *Chadwick* Court, "reflect the settled constitutional principle, discussed earlier, that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home. *Wolf v. Colarado,* 338 U.S. 25, 27, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782 (1949)" (97 S. Ct. at 2483). Therefore, there being no new constitutional principle established by *Chadwick* and *Sanders*, and considering the privacy interests at stake which law enforcement officers have always known to be jealously guarded by all courts, the purposes of the exclusionary rule would *best* be served by applying the *Chadwick* and *Sanders* decisions retroactively.

In urging the Court to apply *Chadwick* and *Sanders* retroactively, petitioner does recognize the overwhelming burden such a decision would place upon the administration of justice. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it was excluded, the witnesses available at the time of the original trial would no longer be available or their memories so dimmed as to make them virtually useless for either side. Similar considerations influenced this Court not to apply the ruling in *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1864 (1961), to state court convictions which had become final before *Mapp* was decided. (*Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965).) The instant situation being very similar to that faced by

the *Linkletter* Court (six of the Courts of Appeals had conflicting views), it is suggested that this Court, to avoid a serious disruption of the administration of justice, might wish to adopt the approach taken by the *Linkletter* Court.

It is thus respectfully submitted that as the principle that a warrantless search of one's personal luggage, even if found in an automobile lawfully stopped, was invalid absent the existence of exigent circumstances even before the *Chadwick* and *Sanders* decisions, the affirmation of that principle should now be applied retroactively or, at the very least, to all cases still pending at the time the *Chadwick* and *Sanders* decisions were rendered.

CONCLUSION

For the above-mentioned reasons, petitioner CHARLES KAUFMAN respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari to review the order of the New Jersey Supreme Court.

Respectfully submitted,

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THOMAS B. MADING

ROBERT A. SEEWALD

Attorneys for Petitioner

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OPINION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

Superior Court of New Jersey, Appellate Division.
A-1634-78
STATE OF NEW JERSEY, Plaintiff-Respondent,
v. CHARLES KAUFMAN, Defendant-Appellant.

Argued: February 25, 1980 - Decided: March 24, 1980

Before Judges Allcorn and Francis

On appeal from Superior Court, Law Division, Hunterdon County.

Thomas B. Mading, attorney for appellant, Robert Seewald of Pennsylvania Bar, argued the cause.

John J. Degnan, Attorney General, attorney for respondent (Mary Ann Kenny Pidgeon, Deputy Attorney General, argued the cause).

PER CURIAM

The order denying defendant's motion to suppress as evidence certain drugs found in a motor vehicle in which he was a passenger, is affirmed substantially for the reasons expressed by Judge Barlow in his oral opinion rendered on July 19, 1978.

ORDER

Supreme Court of New Jersey
September Term 1979
C-711
STATE OF NEW JERSEY, Plaintiff-Respondent,
v. CHARLES KAUFMAN, Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1634-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 28th day of May, 1980.

Stephen W. Townsend
Clerk

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on AUGUST 11, 1980, I served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY (KAUFMAN vs. STATE OF NEW JERSEY) on the following named parties by depositing three copies thereof, each, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

NEIL S. COOPER, First Assistant Prosecutor
OFFICE OF COUNTY PROSECUTOR, HUNTERDON COUNTY
Eight Court Street
Flemington, New Jersey 08822

JOHN J. DEGNAN, Attorney General
State House Annex
Trenton, New Jersey 08625

WADE H. McCREE, JR.,
Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST 11, 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 Copies to United States Supreme Court, Washington, D. C. Docket fee of $200 annexed to Original Copy

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No. 80-216

Supreme Court, U. S.
FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES KAUFMAN,

Petitioner,

vs.

STATE OF NEW JERSEY and JOHN J. DEGNAN, as Attorney General of the State of New Jersey,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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Questions Presented

1. Does the record support the question as stated by petitioner when petitioner lacks standing to contest the search, there was probable cause to search the limousine and the flight bag, the chauffeur consented to the search, exigent circumstances were present, contraband was in plain view of the police officer and the search was incident to a valid arrest?

2. Does the petition present a substantial question when this Court has previously decided that *Chadwick* and *Sanders* are not to be applied retroactively?

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No. 80-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES KAUFMAN,

Petitioner,

vs.

STATE OF NEW JERSEY and JOHN J. DEGNAN, as Attorney General of the State of New Jersey,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF IN OPPOSITION

Opinions Below

The Order of the New Jersey Supreme Court denying petitioner's petition for certification is appended to petitioner's Petition for Certiorari as Appendix B. The unreported opinion of the Superior Court of New Jersey, Appellate Division, is appended to the Petition as Appendix A.

Jurisdiction

Petitioner asserts 28 U.S.C. sec. 1257(3) as the basis for this Court's jurisdiction over his case. The State agrees that this Court has jurisdiction.

Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J.S.A. 24:21-19 Prohibited acts A.—Manufacturing, distributing or dispensing—Penalties

> a. Except as authorized by this act, it shall be unlawful for any person to knowingly or intentionally:
> 1. To manufacture, distribute or dispense or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance.
>
> * * *

N.J.S.A. 24:21-20. Prohibited acts B.—Possession, use or being under influence—Penalties

> A. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional

practice, or except as otherwise authorized by this act.

(1) A substance, in a quantity of less than 1 ounce including any adulterants or dilutants, classified in Schedule I or II which is a narcotic drug, or in a quantity of 1 ounce or more with there being included less than 3.5 grams of the pure free base Schedule I or II narcotic drug, and any other controlled dangerous substance classified in Schedule I, II, III or IV is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both, except as provided in subsection a. (4) below;

(4) Possession of more than 25 grams of marijuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; provided, however, that any person who violates this section with respect to 25 grams or less of marijuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

Statement of the Case

Hunterdon County Indictment No. I-274-M-76 charged petitioner and Charles Wilczenski with unlawful possession of marijuana, contrary to N.J.S.A. 24:21-20(a)(4) (Count 1), unlawful possession of opium, methaqualude and cocaine in violation of N.J.S.A. 24:21-20(a)(1) (Count 2), and unlawful possession of the above named controlled dangerous substances with intent to distribute in violation of N.J.S.A. 24:21-19(a)(1) (Count 3). Petitioner filed a

motion to suppress evidence on July 19, 1978, before the Honorable Richard Barlow, J.S.C. This motion was denied by Judge Barlow on July 27, 1978.

The following facts were adduced at the motion to suppress evidence. At approximately 7 a.m. on April 29, 1977, Officer Dennis M. Balent of the Bridgewater Police Department set up a radar speed trap on Route 22 in Somerset County. Forty-five minutes later, Officer Balent clocked a late model blue Lincoln Continental going 74 m.p.h. in the west bound lane. Officer Balent pursued the limousine into Readington Township, Hunterdon County. He moved his patrol car behind the limousine and put on the overhead lights. The car did not stop. The officer turned on his siren. At this time, he estimated that the car was travelling at 80 m.p.h. After traveling a half a mile, the driver pulled the car over to the curb. The limousine was a new, "shiny", four door Lincoln Continental with New York rental plates. (2T5-17 to 25; 2T6-1 to 25; 2T7-1 to 25).*

Officer Balent approached the car and asked the driver for his credentials. The driver asked why he was being stopped. Officer Balent responded that the driver had been speeding. While the driver searched for his driver's license, registration and insurance card, the Officer observed that the driver was wearing a gray suit similar to that worn by a chauffeur. Officer Balent then looked in the back seat of the limousine where he saw two men: one dressed in a yellow jacket, blue T-shirt and blue jeans and the other

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* 1T through 5T refers to the transcripts of the motion to suppress dated June 28, 1978, July 19, 1978, September 15, 1978, October 17, 1978 and December 15, 1978, respectively. 2AT refers to the second volume of the transcript dated July 19, 1978. Da refers to Petitioner's appendix to his Appellate Division brief.

dressed in a flannel shirt and blue jeans.* Officer Balent also saw one-half to two inches of a clear plastic bag protruding from the front pocket of the yellow jacket worn by the passenger seated in the left side of the limousine. Inside the bag, a white powder clinging to the sides was clearly visible. Based upon his training and experience with the identification of controlled substances, Officer Balent knew that illegal drugs were often contained in clear plastic bags. He also determined that the white powder in the clear plastic bag appeared to be a controlled dangerous substance. (2T41 to 10; 2T9-1 to 25; 2T10-1 to 25; 2T11-20 to 25).

Because of the observation of the bag containing the white powder, Officer Balent knocked on the window and asked the passenger codefendant, Edward F. Wilczenski, to give him the bag. Wilczenski complied. Officer Balent examined the bag and saw that the corners had been cut off the bag.** (2T2-1 to 10; 2T10-19 to 25).

By this time, the driver located his credentials. He was Peter Livshits of 2730 West 33rd Street, New York City. Livshits was employed by a limousine rental agency in New York. (2T12-10 to 14).

After examining the chauffeur's credentials, Officer Balent asked Wilczenski to exit the car, which he did. The

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* Officer Balent told the court at the hearing on the motion to suppress that the passengers "did not appear to be the kind of people who would be passengers in a limousine." (2T9-11 to 12). The officer's assessment was simultaneous with his observation of the clear plastic bag containing cocaine in codefendant's pocket. (2T23-11 to 13).

** A later search revealed that the corner of the bag was in Wilczenski's sock. The corner of the bag contained cocaine. (2T19-10 to 11).

men moved to the back of the car. Officer Balent advised Wilczenski of his rights and then asked him about the plastic bag. Wilczenski replied that he found it on the floor of the car when he entered the car in New York. Officer Balent asked Wilczenski for identification and Wilczenski produced a Pennsylvania driver's license. (2T12-16 to 25; 2T13-1).

While Officer Balent interrogated Wilczenski, Patrolman Robert Smith of Readington Township Police Department and Officer James Paliani of the Bridgewater Township Police Department arrived as backup. Officer Paliani took Wilczenski into custody, while Officer Balent questioned Livshits. Livshits denied seeing the clear plastic bag before the officer found it in Wilczenski's pocket. Livshits said that he cleaned and vacuumed the passenger compartment before he picked up the fares and there was no plastic bag in the car at that time. Officer Balent asked Livshits if he could search the limousine and Livshits consented. (2T13-1 to 25; 2T14-1 to 10).

Officer Balent instructed Patrolman Smith to question the other passenger.* Patrolman Smith recognized the passenger as petitioner, Charles Kaufman. He asked petitioner to exit the car, but petitioner refused. After a few minutes of argument described as a "boisterous" "shouting incident," petitioner complied. When the door opened, Officer Smith saw a brown leather flight bag on the limousine floor between petitioner's legs. Officer Smith saw a white residue on top of the bag. (2T14-1 to 25; 2T15-1 to 25; 2T42-16 to 22; 2T43-1 to 19).

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* Although Officer Balent testified that petitioner was not under arrest at this time, petitioner was being held in police custody and was not free to leave. (2T28-21 to 25).

Officer Balent entered the limousine, and searched the front seat and glove compartment. He found no contraband. He looked in the back seat and saw a brown leather flight bag on the floor of the right rear passenger seat where petitioner had been seated. A white powder residue, similar to the white powder contained in the plastic bag found in Wilczenski's possession, was on both sides of the brown metal zipper. The white powder was easily visible against the brown bag. The bag had three zippers. Officer Balent opened the middle zipper and found a brown paper bag which he opened. A second paper bag was inside. Officer Balent opened that bag and found three clear plastic bags containing white powder, three clear plastic bags containing marijuana and another bag containing white pills. Officer Balent lifted out the large paper bag and underneath it, he found another bag containing white powder, a clear plastic bag containing a large chunk of a black substance and two clear plastic bags wrapped with a rubber band. One of these bags contained marijuana, the other was filled with white pills. (2T15-8 to 16; 2T16-1 to 25; 2T17-1 to 25; 2T18-1 to 18).

Officer Balent arrested petitioner and Wilczenski, handcuffed them and placed them in the patrol car. After Officer Balent advised petitioner of his constitutional rights, petitioner said that he never saw the bag before. (2T19-1 to 25).

Laboratory tests of the contraband determined that petitioner possessed the following controlled dangerous substances: 822.99 grams of cocaine and xylocaine (1.94 pounds), 120.65 grams of marijuana, 26.57 grams of opium and 40 white pills containing methaqualone. (1T9-9 to 25; 1T10-1 to 11).*

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* The laboratory report was accepted into evidence at the motion to suppress, [2T46-24 to 25] but its contents were only set forth in detail during the Grand Jury testimony of Officer Balent.

Pursuant to a plea bargain, petitioner entered a guilty plea to Count 3 on October 17, 1978.

In an unpublished opinion, the Superior Court of New Jersey, Appellate Division, affirmed the conviction below on March 24, 1979. (Pa2). Petitioner's petition for certification to the New Jersey Supreme Court was denied on February 27, 1980. (Pa1).

REASONS FOR DENYING CERTIORARI

POINT I

The record does not support petitioner's question.

Petitioner relies solely upon this Court's decisions in *United States* v. *Chadwick,* 433 U.S. 1 (1977) and *Arkansas* v. *Sanders,* 442 U.S. 753 (1979) to support his contention that the searches of the limousine and the flight bag were a violation of his constitutional rights. Because these cases were decided after the search, petitioner also submits that *Chadwick* and *Sanders* must be applied retroactively in order to invalidate the search at issue. The State of New Jersey respectively submits that the question of retroactivity is not properly presented to this Court because the record below demonstrates that *Chadwick* and *Sanders* are totally inapplicable to the facts in question. For that reason, the issue of the retroactive application of *Chadwick* and *Sanders* need not be addressed by this Court.

The State of New Jersey will demonstrate that the searches of the limousine and the flight bag were totally dissimilar to the facts in *Chadwick* and *Sanders*, and the search was clearly permissible under *Chambers* v. *Maroney,* 399 U.S. 42, 49-50 (1970) and *Carroll* v. *United States,* 267 U.S. 132, 153 (1925). In *Chadwick,* the police had known

for several days that a drug shipment would arrive by train in Boston, however, the authorities obtained neither an arrest warrant nor a search warrant. When the suspects arrived with the footlocker at the train depot, the police were there surveilling their activities. Police dogs verified that the locker contained a controlled dangerous substance. As soon as the locker was placed in a waiting car, the suspects were arrested and the locker was transported to the federal building. An hour and a half after the arrests, the federal agents opened the footlocker without first securing a warrant. 433 U.S. at 3. This Court ruled that "when no exigency is shown to support the need for an immediate search, the warrant clause places the line at the point where the property to be searched comes under the exclusive domain of police authority." *Id.* at 16.

The Government did not contend in *Chadwick* that the footlocker's brief contact with Chadwick's car justified a warrantless search under the automobile exception. In fact, as noted in the dissenting opinion, "if the agents had postponed the arrest until the respondents started to drive away then the car could have been seized, taken to the agents' office, and all its contents—including the footlocker —searched without a warrant." 433 U.S. at 15. Thus, the scope of *Chadwick* is extremely narrow. Moreover, the sole justification argued by the Government for the *Chadwick* search was the theory that the Warrant Clause of the Fourth Amendment has absolutely no application to searches conducted outside of "private dwellings and a few other high privacy areas." 433 U.S. at 13. There was no attempt made to rely on either the automobile exception or the search incident to an arrest exception to the warrant requirement.

Moreover, nothing in the opinion suggested that it was intended to overrule prior opinions which extended the

"automobile search" exception from the warrant requirement to the contents of locked compartments, including glove compartments and trunks. See *Texas* v. *White,* 423 U.S. 67 (1975), reh. den. 423 U.S. 1081 (1975); *Cady* v. *Dombrowski,* 413 U.S. 433 (1973); *Chambers* v. *Maroney,* 399 U.S. 42 (1970), reh. den. 400 U.S. 856 (1971). Thus, many appellate courts have refused to interpret *Chadwick* as a *per se* rule prohibiting warrantless searches of luggage situated in cars, and have applied instead the probable cause standard relevant to the "automobile exception." *United States* v. *Finnegan,* 568 F.2d 637, 640-642 (9 Cir. 1977); *United States* v. *Young,* 567 F.2d 799, 802 n.3 (8 Cir. 1977), *cert.* den. 439 U.S. 1079 (1978); *United States* v. *Matlock,* 558 F.2d 1328 (8 Cir. 1977), *cert. den.* 434 U.S. 872 (1970); *cf. United States* v. *Berry,* 560 F.2d 861 (7 Cir. 1977) rev'd in other grounds 571 F.2d 2 (7 Cir. 1978), *cert.* den. *sub nom. Richardson* v. *United States,* 439 U.S. 840 (1978).

In *Sanders,* the police received a tip that defendant was arriving on an American Airlines flight at 4:35 that afternoon and that defendant would be carrying a green suitcase containing marijuana. The police surveilled the airport and saw defendant arrive and pick up a green suitcase at the airline luggage service. Defendant gave the suitcase to a companion, who put the suitcase in the trunk of a taxi. The police stopped the taxi outside the airport. The taxi driver opened the trunk at the request of the police and the police seized the green suitcase. A search of the suitcase revealed 9.3 pounds of marijuana. 442 U.S. at 755.

The *Sanders* Court ruled that the search of the suitcase was unlawful because of the lack of the exigency of mobility immediately prior to the search and the expectation of privacy inherent in suitcases. However, *Sanders*

created an exception to its rule when it stated that some containers "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." 442 U.S. at 765 n.13. The Court ruled that when the contents of the package are open to plain view, the warrant requirement is obviated. *Id.*

Justice Powell, speaking for a majority of the Court, noted that the case had been accepted by a writ of *certiorari* to the Supreme Court of Arkansas "to resolve some apparent misunderstanding as to the application of [the Court's] decision in *United States* v. *Chadwick,* [*supra*], to warrantless search of luggage seized from an automobile." *Id.* at 754. However, as noted by the Honorable Chief Justice Burger, (concurring), the *Sanders* opinion did not involve the automobile exception of the warrant requirement. This was particularly true since the police had probable cause to search the luggage *before* it was placed into the trunk of the taxi cab. See *Arkansas* v. *Sanders, supra* at 766 (Burger, C.J. concurring). In *Sanders, supra,* the relationship between the luggage searched and the automobile was "purely coincidental," as in *Chadwick. Id.* at 767. "[Sanders] simply does not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle . . ." (*Id.*) (emphasis in original).

The case currently under review presents the question of whether a warrant is required before law enforcement officials may search an automobile when they have no advance notice that a particular individual may have contraband on his person or in his luggage. For this reason the facts of *Chadwick* and *Sanders* differ substantially from the case at bar. First, it is apparent that petitioner

lacks standing to contest these searches under this Court's recent decision in *United States* v. *Salvucci,* —— U.S. ——, 100 S.Ct. 2547 (1980). See also *Rakas* v. *Illinois,* 439 U.S. 128, reh. den. 439 U.S. 1122 (1979). Petitioner failed to assert that his constitutional rights had been violated because the testimony presented at the motion to suppress demonstrated that petitioner denied a possessory interest in the flight bag. (2T19-1 to 25). Thus, he lacks standing to contest the legality of the search of the bag and the limousine.* See *Id.*

Second, there was probable cause to search the limousine when Officer Balent looked in the vehicle, which he had stopped for a speeding violation, to observe the passengers. As the officer observed the passengers, he saw one and a half to two inches of a clear plastic bag protruding from passenger Wilczenski's pocket. It was readily apparent that the bag contained a residue of white powder. (2T23-11 to 13). Because of his training and experience in the identification of controlled dangerous substances, Officer Balent knew that illicit drugs were often transported in baggies.** Consequently, the police officer formed a "well grounded suspicion" that the white powder in the baggie was a controlled dangerous substance. (2T4-1 to 10; 2T9-1 to 25; 2T10-1 to 25; 2T11-20 to 25). See *Chambers* v. *Maroney, supra.*

Additional probable cause was provided by the fact that Wilczenski was nervous and evasive while Officer Balent

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* The question of standing was not raised below.

** The decision was based upon five years experience as a police officer, a forty hour course conducted by the New Jersey State Police concerning identification of controlled dangerous substances and their packaging, and involvement in approximately 70 to 75 drug investigations and arrests. (2T5-1 to 12).

questioned him. Moreover, petitioner refused to exit the limousine and engaged in a boisterous exchange with Officer Smith before he complied with the officer's order to exit the limousine. (2T19-1 to 25). See *id.*

An additional reason why the present facts differ drastically from *Sanders* and *Chadwick* is that the chauffeur of the limousine consented to the search of the vehicle. See *United States* v. *Matlock,* 415 U.S. 164, 188 (1974); *Frazier* v. *Cupp,* 394 U.S. 731, 733 (1969); *Bumpers* v. *North Carolina,* 391 U.S. 543 (1968). The chauffeur was the agent of the owner and exercised dominion and control over the vehicle. Petitioner and Wilczenski merely rented the limousine for a ride from New York, New York, to Easton, Pennsylvania. Therefore, neither passenger had a possessory interest nor an expectation of privacy in the vehicle. See *United States* v. *Salvucci, supra; Rakas* v. *Illinois, supra.* See also *Katz* v. *United States,* 389 U.S. 347, 357 (1967). Clearly, the officer lawfully entered and searched the limousine. See *Chambers* v. *Maroney, supra; Carroll* v. *United States, supra.*

Third, the facts surrounding the search of the brown leather flight bag are also distinguishable from *Sanders* and *Chadwick* because of the exigent circumstances present. In the case at bar, the car was stopped on the side of the highway early on a Sunday morning for a speeding violation. One of the passengers possessed a baggie containing a white powder residue in plain view of the officer. This passenger, Wilczenski, was nervous and evasive when he spoke. Officer Smith observed a brown leather flight bag with a white powder residue on its top when he opened the door beside the petitioner's seat. At first, petitioner refused to exit the limousine, but when petitioner did leave the vehicle, Officer Balent also observed the bag and the powdery residue on the top zipper of the bag. Officer Balent searched the bag and discovered cocaine, opium, quaa-

ludes and marijuana. After the search, petitioner disavowed ownership of the bag. (2T15-8 to 16-1 to 25; 2T17-1 to 25; 2T18-1 to 18; 2T19-1 to 25).

This was not the type of search involved in *Chadwick* and *Sanders*. There was no informant's tip to law enforcement officials to watch for a blue limousine with New York plates, carrying two blue-jean-clad passengers with a brown leather flight bag containing a half million dollars worth of drugs. In fact, this case was precisely the type of search sanctioned in *Chambers* and *Maroney*. Because the police officers had no advance notice of the drugs, they had no prior opportunity to acquire a search warrant. Moreover, prior to the search of the limousine, Officer Balent had no probable cause to search the bag. The primary search was a search of the vehicle and the placing of the luggage therein was not merely "coincidental." *Cf. Arkansas* v. *Sanders, supra* at 767. Furthermore, this case differs because even though two back up officers assisted Officer Balent, petitioner and his passenger nonetheless could have attempted to harm the officers or escape with the flight bag as the stop occurred along a highway at 7 a.m. on a Sunday morning. Clearly, the suspects could have had concealed weapons, fired at the police and fled the scene in the limousine or on foot. The police could have prevailed upon few to assist them at that hour, in that location and under those circumstances. Thus, neither the automobile nor the contents were under exclusive control of the police. Clearly exigent circumstances existed when Officer Balent opened the flight bag and because of the inherent mobility of the automobile, destruction of that evidence was clearly possible. See *Chambers* v. *Maroney, supra.* See also *United States* v. *Fontecha,* 576 F.2d 601 (5 Cir. 1978).

This case falls squarely within the automobile exception also because the officers were faced with the fact that the

chauffeur appeared to have no knowledge of drugs found on Wilczenski. Therefore, under petitioner's view of the law, the officers would have had to release the chauffeur and his vehicle and thus lose the bag covered with illicit drugs. Under this type of exigent circumstances, the search of the bag was reasonable. See *Chambers* v. *Maroney, supra.*

An additional compelling difference caused by the police officers' lack of advance notice that passengers would be ferrying drugs through New Jersey is the untenable position of the police who lawfully searched the limousine, but under petitioner's strained reading of *Chadwick* and *Sanders,* would have to unload the luggage, covered with illicit drugs, place it on the side of the road and obtain a warrant for the search of the luggage while they lawfully searched the vehicle. This interpretation of the law places an onerous burden not only upon law enforcement officials but also upon innocent passengers who may be detained while a magistrate is sought.

Fourth, this case differs from *Chadwick* and *Sanders* because the white powder residue on the flight bag announced to the investigating officers that the bag contained illicit drugs. This residue, coupled with the discovery of the white powder residue in Wilczenski's pocket, demonstrates that the "very nature" of the flight bag cannot support a reasonable expectation of privacy. Therefore, the search of the flight bag was proper because this Court in *Sanders* expressly distinguished these facts from its application. *Id.* at 765, n.13. See also *Harris* v. *United States,* 390 U.S. 234 (1968); *United States* v. *Pugh,* 566 F.2d 626 (8 Cir. 1977).

Finally, in addition to the automobile exception to the warrant requirement, the court below ruled that these searches were lawful because at least two additional excep-

tions were also applicable. The first was the search incident to a lawful arrest exception. The trial court reasoned that the searches were lawful because the searches occurred after the lawful arrest of Wilczenski.* See generally *Cupp* v. *Murphy,* 412 U.S. 291 (1973); *Chimel* v. *California,* 395 U.S. 752 (1969). Additionally, the court ruled petitioner's arrest was reasonably contemporaneous to the search and was thus valid under *State* v. *Doyle,* 42 N.J. 334, 342, 200 A.2d 601 (1964). Secondly, the trial court ruled that the search of the flight bag was proper because the contraband contained in the bag fell within the plain view of the officers. See *Harris* v. *United States,* 399 U.S. 294 (1968); *State* v. *Braxton,* 111 N.J.Super. 191, 264 A.2d 757 (App.Div. 1970). Thus the trial court ruled that the search of the limousine and the flight bag was proper because the case was distinguishable from *United States* v. *Chadwick,* and within the automobile exception, the search incident to a lawful arrest exception and the plain view exception. (2AT16-1 to 25; 2AT38-19 to 22; 2AT40 to 2AT49).

In short, the State of New Jersey respectfully submits the lower court's denial of the motion to suppress was proper. The facts in the present case differ so substantially from those decisions because in this case the police properly perceived the requisite probable cause and exigencies. These facts fall within the automobile exception provided in *Chambers* v. *Maroney.* Moreover, the fact that a white powder residue was on top of the flight bag excepts its search from *Sanders* because it was apparent from plain view that it contained illicit drugs. For these reasons, the

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* The Superior Court of New Jersey, Appellate Division, affirmed Judge Barlow's opinion for the reasons expressed in his oral ruling dated July 19, 1978. (PaA). The Supreme Court of New Jersey expressed no reasons for its ruling. (PaB).

State of New Jersey respectfully submits that the facts of *Chadwick* and *Sanders* are inapplicable to the present case and therefore, the record does not support petitioner's request for the retroactive application of those cases. Finally, petitioner lacks standing to contest the validity of the search. Therefore, the petition for *certiorari* should be denied.

POINT II

The petition does not present a substantial question because decisions of this Court indicate that *Chadwick* and *Sanders* shall not be applied retroactively.

In the event that this Court finds that *Chadwick* and *Sanders* are applicable to the present case, the State respectfully submits that the precedents established by this Court mandate prospective application of those decisions. Thus, because the search of the limousine occurred in April, 1977, and prior to the Court's decisions in *Chadwick* and *Sanders,* the petition fails to state a substantial question and must be denied.

This Court has considered the retroactive application of Fourth Amendment to search and seizure questions in *United States* v. *Peltier,* 422 U.S. 531 (1975). At the outset, the Court explained:

> Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accu-

> racy of guilty verdicts in past trials," the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application. [*Id.* at 535, (citations omitted)].

Moreover, the *Peltier* Court set forth two policies as supporting the prospective application of the exclusionary rule: 1) the "imperative of judicial integrity," which was set forth in *Elkins* v. *United States,* 364 U.S. 206, 222 (1960), and 2) the deterrence of illegal police conduct, which is often cited as the rationale underpinning the exclusionary rule. *United States* v. *Peltier, supra* 422 U.S. at 536. See generally *Brown* v. *Louisiana,* —— U.S. ——, 100 S.Ct. 2214 (1980).

In *Peltier,* the Court reviewed the decisions concerning retroactivity and concluded that the maintenance of judicial integrity required that:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. [*Id.* at 537]

The Court continued its review and reached a similar conclusion concerning the question of deterrence:

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. [*Id.* at 542]

Finally, the *Peltier* Court noted that earlier decisions had pointed to the added burden on the administration of justice as a consideration. 422 U.S. at 534, quoting *Stovall* v. *Denno,* 308 U.S. 293, 297 (1967).*

In the case at bar, the State respectfully submits that the police officers acted reasonably and should not be charged the knowledge that the search of petitioner's flight bag may have been illegal. It is our position that *Chadwick* and *Sanders* marked a shift in the law, even though the Court did not expressly overrule any prior decisions. See *United States* v. *Calandrella,* 605 F.2d 236, 251 (9 Cir. 1979), *cert.* den. *sub nom. Kaye* v. *United States,* —— U.S. ——, 100 S.Ct. 522 (1979); *United States* v. *Berry,* 560 F.2d 861, 863-64 (7 Cir. 1977), vacated on other grounds 571 F.2d 2 (7 Cir.), *cert.* den. *sub. nom. Richardson* v. *United States,* 439 U.S. 840 (1978). See also *United States* v. *Peltier, supra,* 422 U.S. at 544-49, (Brennan, J., dissenting).

There is no question that the search and seizure in the present case were consistent with the law of the United

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* The New Jersey courts follows this criteria when addressing questions of retroactivity. See *e.g., State* v. *Patino,* 83 N.J. 1, —— A.2d —— (1980); *State* v. *Howery,* 80 N.J. 563, 404 A.2d 1111 (1979).

States Supreme Court at that time. See *e.g., United States* v. *Edwards,* 415 U.S. 800 (1974); *United States* v. *Robinson,* 414 U.S. 218 (1973); *Abel* v. *United States,* 362 U.S. 217 (1960); *Draper* v. *United States,* 358 U.S. 307 (1959). The courts of the State of New Jersey also set forth no reason to conclude that suitcases carried in automobiles would not fall within the automobile exception to the warrant requirement. See generally *State* v. *Waltz,* 61 N.J. 83, 86, 293 A.2d 167 (1972); *State* v. *Barnes,* 54 N.J. 1, 252 A.2d 398 (1969), *cert.* den. 396 U.S. 1028 (1971); *State* v. *Hock,* 54 N.J. 526, 257 A.2d 699 (1969), *cert.* den. 399 U.S. 930 (1970); *State* v. *Boykins,* 50 N.J. 73, 232 A.2d 141 (1967); *State* v. *Smith,* 113 N.J.Super. 120, 129, 273 A.2d 68 (App.Div. 1971), certif. den. 59 N.J. 293, 281 A.2d 806 (1971).

Because law enforcement personnel were entitled to rely upon these cases as establishing the legality of the search in question, it is the position of the State "that neither the 'imperative of judicial integrity' nor the 'deterrent purpose served by the exclusionary rule' would be served by the retroactive application of the exclusionary rule in this case." *United States* v. *Calandrella, supra* 605 F.2d at 252 citing *United States* v. *Peltier, supra* 422 U.S. at 536. The State urges the Court to deny the petition and thus follow the rationale of the Second, Fifth, Sixth, Seventh and Ninth Circuits, which have declined to apply *Chadwick* retroactively. See *United States* v. *Reda,* 563 F.2d 510 (2 Cir. 1977), *cert. den.* 435 U.S. 973 (1978), reh. den. 436 U.S. 923 (1979);* *United States* v. *Kranzthor,* 614 F. 2d 981 (5 Cir. 1980); *United States* v. *Montgomery,* 558 F.2d 311 (5 Cir. 1977); *United States* v. *Calandrella,* 605 F.2d 236 (6 Cir. 1979), *cert.* den. —— U.S. ——, 100 S.Ct. 522 (1980); *United States* v. *Berry,* 571 F.2d 2 (7 Cir.),

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* See also *United States* v. *Ochs,* 595 F.2d 1247 (2 Cir. 1979).

cert. den. 439 U.S. 840 (1978); *United States* v. *Choate,* 576 F.2d 165, 182 n. 20 (9 Cir.), *Cf. United States* v. *Dien,* 609 F.2d 1038, 1046 (2d Cir. 1979), aff'd 615 F.2d 10 (2 Cir. 1980).

Petitioner's principal argument for the retroactive application of *Chadwick* is the same as that raised by appellant in *United States* v. *Calandrella.* Both Calandrella and petitioner contended that this Court has "*sub silentio*" ruled that *Chadwick* should be applied retroactively because it applied *Chadwick* to its decision in *Arkansas* v. *Sanders,* 422 U.S. 753 (1979) and by denying *certiorari* in *United States* v. *Stevie,* 443 U.S. 911 (1979). Petitioner points out that the search in *Sanders* occurred prior to the decision in *Chadwick* and the Eighth Circuit's ruling in *Stevie* referred to its prior decision concerning retroactivity. (Pb13). This argument is wholly without merit. *United States* v. *Calandrella, supra* 560 F.2d at 252. It is well established that a recently announced principle does not affect the court's later determination of retroactivity. *United States* v. *Peltier,* 422 U.S. at 535 n.5; *United States* v. *Calandrella, supra.* Therefore, because the Court did not discuss retroactivity in *Sanders,* that issue was clearly not resolved. *Id.* Furthermore, the denial of *certiorari* in *Stevie* imports no statement on the merits of the case. *Id.* citing *Brown* v. *Allen,* 344 U.S. 443 (1953); *United States* v. *Carver,* 260 U.S. 482, 490 (1923).

Petitioner also contends that the Court's order of remand in *United States* v. *Schleis,* 433 U.S. 905 (1979) supports his position concerning retroactivity. In its remand, this Court ordered the Eighth Circuit to reconsider its decision in light of *Chadwick.* The State of New Jersey urges that this contention is also meritless because "it is at least equally likely that the court remanded the case in order to permit the Eighth Circuit to consider, *inter alia,* the question of retroactivity." *United States* v. *Calan-*

drella, supra 605 F.2d at 252. Accord *United States* v. *Bowen,* 500 F.2d 960 (9 Cir. 1974); C. Wright, *Law of Federal Courts sec.* 108 (3d Ed. 1976).

Finally, petitioner asserts that the administrative burden caused by the retroactive application of *Chadwick* and *Sanders* could be avoided by restricting its application to state court convictions which had become final before *Chadwick* was decided. See *Linkletter* v. *Walker,* 381 U.S. 618 (1965). The State respectfully submits that this suggestion would not ameliorate the administrative overburdening which petitioner suggests. Nonetheless, this question need not be decided because petitioner has failed to demonstrate that *Chadwick* and *Sanders* should be applied retroactively. See *United States* v. *Peltier, supra; Stovall* v. *Denno, supra.*

In sum, petitioner has failed to state a substantial question because this court's decision in *Peltier* mandates that *Chadwick* and *Sanders* apply prospectively and thus those rulings do not reach petitioner's case in which the search occurred prior to both decisions. Moreover, the State of New Jersey repeats that the question of retroactivity need not even be reached because the facts of the present search fall outside the decision in *Chadwick* and *Sanders.* For these reasons, the petition should be denied.

CONCLUSION

Petitioner's claims notwithstanding, although his claims implicate the United States Constitution, they are neither novel nor do they present a substantial question of law. We therefore urge this Court to deny this Petition.

Respectfully submitted,

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